



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
REGIONAL AND URBAN POLICY

The Director-General

Brussels,  
REGIO C2/REG/D(2014)

**Subject:** Final position letter  
Regional Development Operational Programme  
CCI 2007BG161PO001  
Mission n°2012/BG/REGIO/J2/1164/1 of 10 – 14 September 2012

**Ref.:** Member State letter 7-657 of 1 March 2013 (Ares(2013)298352)  
Member State letter 1.1-883 of 2 April 2013 (Ares(2013)558019)  
Commission letter Ares(2013)3788837 – 20/12/2013  
Commission letter Ares(2014)0652690 – 10/03/2014  
Member State letter 7.7-23/12 of 12 May 2014 (Ares(2014)1517007)

Your Excellency

I write to inform you that following its audit of the programme Regional Development Operational Programme (CCI 2007BG161PO001) and the Member State's reply regarding the open findings in our final position letter of 12 May 2014, the Directorate-General of Regional and Urban Policy has concluded its assessment of the reply.

The assessment of the reply of the Member State is set out in **annex I** to this letter.

Details of the requested and accepted financial corrections are provided in **annex II** to this letter. As the irregular expenditure detected, as presented in annex II, has been accepted by you, and you have agreed to make the required financial corrections, no further action will be taken by the Commission. The audit is therefore closed.

Furthermore the Member State has already confirmed that findings which have a financial impact on the EU budget exceeding EUR 10 000 are to be reported to OLAF in the IMS system for reporting irregularities.

I would like to remind you that under Article 90(1) of Council Regulation (EC) N° 1083/2006, the competent bodies and authorities are required to keep available all relevant documents for a period of three years following the closure of an operational

His Excellency Mr Dimitar TZANTCHEV  
Ambassador Extraordinary and Plenipotentiary Permanent Representative  
Permanent Representation of Bulgaria to the EU  
Square Marie-Louise/Maria Louizasquare 49  
1000 Bruxelles/Brussel

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.

Office: B-1049/ST. Telephone: direct line (32-2) 299 44 09.

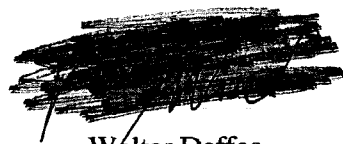
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E-mail: [regional\\_policy@ec.europa.eu](mailto:regional_policy@ec.europa.eu)

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programme as defined in Article 89(3) of the Regulation or three years following the year in which partial closure takes place, in case of documents regarding expenditure and audits on operations referred to in 90(2) of the Regulation.

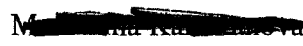
Yours faithfully


  
Walter Deffaa





Enclosures:     Annex I – DG Regional and Urban Policy's conclusions for each open finding  
                      Annex II – Details of the requested and accepted financial corrections

Copies:

  
Acting Director  
Programming of Regional Development Directorate General  
Ministry of Regional development and Public Works  
17-19, Kiril and Metodii Street  
1202 Sofia  
Bulgaria

  
Director  
National Fund Directorate  
Ministry of Finance  
102, Rakovski Street  
1040 Sofia  
Bulgaria

  
Executive Director  
Audit of EU Funds Executive Agency  
4, Slavyanska Street  
1040 Sofia  
Bulgaria

Ms V. Alliata-di Villafranca, DG Regional and Urban Policy, E  
Mr , DG Regional and Urban Policy, E3  
Mr , DG Regional and Urban Policy, C1  
Mr , DG Employment, Social Affairs and Inclusion, H3  
Mr , DG Maritime Affairs and Fisheries, F.1  
Mr Martin Weber, Director, European Court of Auditors (Chamber II  
- Structural Policies, Transport and Energy) - functional mailbox  
[ECAP ETE@eca.europa.eu](mailto:ECAP ETE@eca.europa.eu)  
OLAF

**ANNEX I – DG REGIONAL AND URBAN POLICY’S CONCLUSIONS FOR EACH OPEN  
FINDING**

Findings 1, 2, 4, 5, 6, 8, 9, 10, 11 and 12 have been closed with letter Ares(2013)3788837 – 20/12/2013. Although findings 11 and 12 were closed, the managing authority provided additional information in relation to these two findings in its reply.

**Findings 1- 3 relate to projects implemented by municipalities – municipal network-type (class IV) roads**

**Duptnitsa – Reconstruction of the road network**

***Finding n°3: Supervision contract – irregular award criteria and minimum deadline for submission of the offers not respected***

The contract award basis was the most economically advantageous offer based on the following award criteria:

- |   |     |
|---|-----|
| • Price                                   | 40% |
| • Experience (similar projects completed) | 20% |
| • Qualifications and experience of staff  | 40% |

The award criteria totalling 60% (similar projects completed – 20% and qualifications of staff – 40%) were not directly linked to the subject-matter of the offer. They are thus offering an advantage to a party and unjustifiably restricting the participation of parties. This is forbidden by Article 9 of the Bulgarian Ordinance for the Award of Small Public Contracts ('Ordinance').

The contracting authority has used an open national procedure although it was allowed to use a simplified tender procedure where it would request three offers. The deadline for the submission of offers in the tender notice was 28 days. This is shorter than the deadline of 33 days stipulated by Article 35 of the 'Ordinance'.

***Action n°3: (Responsible body: Managing authority; Deadline: 60 days; Priority: High)***

A financial correction of 10% of the contract value of the supervision contract is proposed in accordance with point 23 of the 'Guidelines'. The total value of the contract (VAT included) is BGN 34 364. The managing authority is requested to apply a financial correction of BGN 2 921 (= 34 364 \* 10% \* 85%) or EUR 1 493.

***First Member State reply***

The tender was launched by Decision 1834 of 25.09.2008 and a tender notice was published on the website of the State Gazette under number 6 of 26.09.2008 and an open competition was held.

Section IV.3.4 of the notice set 22.10.2008 as the deadline for receipt of tenders and the notice was forwarded for publication on 25.09.2008. One bid was received, that of the tenderer ~~Public Procurement Agency~~; the latter was selected for a contractor under Decision 2043 of 27.10.2008 of the contracting authority, as its tender complied with all requirements for the public procurement contract.

The official website of the Commission for Protection of Competition contains no data about appealing of the procedure.

The Bulgarian Act on Public Procurement (ZOP) and the Bulgarian Ordinance for the Award of Small Public Contracts in force at the time of the launch of the open competition (25.09.2008) did not contain wording prohibiting contracting authorities from including selection criteria as indicators in the methodology. The explicit prohibition was included in the ZOP and the Bulgarian Ordinance for the Award of Small Public Contracts on 01.01.2009.

Therefore, the described actions of the contracting authority regarding the identification of a tender evaluation methodology could not be qualified as an infringement and accordingly there is no irregularity.

The Public Procurement Agency's opinion is along the same lines: The applicable EU directives contained no explicit prohibition on mixing selection and award criteria. But the systematic position and logical content of the provisions make such an approach inadmissible. The prohibition to mix selection criteria with award criteria is laid down in the judgment of the European Court of Justice on case C-532/06 (Lianakis), which interprets the directives in line with the fundamental principles of Community law. Prior to 2009 there was no such explicit ban in the law, respectively no proportional administrative penalty was envisaged. Hence the conclusion that if an action is not defined as punishable, persons cannot be held liable for it. On this basis the regulatory authority came up with a general conclusion that persons should be held liable for allowing prohibited the mixing of eligibility and award criteria in public procurement tenders initiated after 1 January 2009, when an explicit prohibition in ZOP was put in place.

#### ***Commission position following first Member State reply***

The contract in question was below the thresholds stipulated by the Directive 2004/18/EC. The managing authority has considered whether a financial correction is applicable. The managing authority argues that the applicable national legislation valid when the tender was launched did not contain specific provisions that would ban the mixing of selection and award criteria. As a result, the managing authority concludes that a financial correction should not be applied to the contract. The Commission notes the decision of the managing authority.

Nevertheless, the managing authority did not provide any explanation as why the deadline for the submission of offers in the tender notice was 28 days which is shorter than the deadline of 33 days stipulated by Article 35 of the 'Ordinance'. The Commission is of the opinion that this breach of the national regulations alone justifies a financial correction of 10% of the contract value of the supervision contract in accordance with point 23 of the 'Guidelines'. The total value of the contract (VAT included) is BGN 34 364. The managing authority is requested to apply a financial correction of BGN 2 921 (= 34 364 \* 10% \* 85%) or EUR 1 493.

Finding is **open**.

### ***Second Member State reply***

Following the letter of the audit authority in relation to change in its approach in treating cases where there is a mixing of selection and award criteria, the managing authority has reassessed the finding and has now accepted to apply the financial correction proposed in relation to the mixing of selection and award criteria. The financial correction of 10% of the contract value of the supervision contract to be applied is in accordance with point 23 of the 'Guidelines'. The financial correction of BGN 2 921 ( $= 34\,364 * 10\% * 85\%$ ) or EUR 1 493 has been notified to the beneficiary.

In relation to the shortened deadlines for submission of offers (28 instead of 33 days as stipulated by Article 35 of the 'Ordinance') the managing authority has analysed the evaluation process and has stated that the shortened deadline did not have a financial impact and therefore does not apply a financial correction for this breach. The arguments of the managing authority are that:

- the contracting authority held an open procedure even though the legislation allowed him to award the contract with receiving three offers;
- there were no appeals for the procedure;
- the cross-border interest cannot be established because of the small value of the contract.

### ***Commission position following second Member State reply***

Although the contracting authority was allowed to award the contract receiving 3 offers, it nevertheless decided to launch the procedure with an open tender under the 'Ordinance'. Therefore, it should have ensured the compliance of its procedure to the relevant articles of the 'Ordinance'. However, given the fact that there is a financial correction accepted by the managing authority for mixing of the selection and award criteria for this contract and based on the principle of non-accumulation of financial correction, we will not pursue the application of a financial correction for shortening the deadlines. The managing authority should ensure through its management verifications that in cases of identified breaches of public procurement rules the appropriate financial corrections are applied even in cases where only national public procurement rules are applicable.

The finding is therefore **closed**.

**Findings 4-11 relate to projects implemented by the Road Infrastructure Agency – class II and III roads**

**Rehabilitation of roads III-59, III-663 and III-5071**

***Finding n°7: Unjustified rejection of a tender***

Ten bids were submitted for the works contract. Seven bids were rejected in the selection phase and three bids were evaluated in the award stage. The reasons for rejection of six tenderers appear to be justified.

The reason for rejection of one tenderer (██████████) in the selection phase is not justified. The reason for rejection stated by the evaluation committee was that their laboratory key expert studied Engineering – Physics – Polymers and not Engineering – Chemistry or Engineering – Road construction. The tender notice and the tender dossier required work experience and not education in the specific fields of Engineering. The Laboratory key expert of ██████████ possessed, according to the CV presented, the work experience required.

***Action n°7 (Responsible body: Managing authority; Deadline: 60 days; Priority: High):***

The financial impact of the unjustified rejection should be calculated. The managing authority should proceed to the opening of the price and technical bid of the unjustified rejected tender of ██████████. They should reassess the most economically advantageous tender including ██████████. In case ██████████'s offer is the most economically advantageous offer and its price offer is lower than the price offer of the winning tenderer (██████████), a financial correction should be applied, amounting to the difference between the prices offered by ██████████ and ██████████. The amount of any such correction should be advised to the Commission.

***First Member State reply***

The requirement of the contracting authority regarding experience and education of the key experts of each tenderer is specified in cumulative terms in Section III.2.3(D.2) of the tender notice and in point 6.1.4.1 of the tender dossier, namely: Key experts should have at least 3 years of experience as construction engineers, chemical engineers, mechanical engineers or at least 5 years of experience as construction technicians in an area relevant to the subject matter of the public procurement contract (construction of roads, including road structures and facilities, construction of runways). It is evident from the requirement itself that it contains an exhaustive list of education qualifications which are acceptable to the contracting authority – construction engineers, chemical engineers, mechanical engineers or construction technicians in an area relevant to the subject-matter of the public procurement contract (construction of roads, including road structures, construction of runways).

In the context of the foregoing, the expert ██████████, named by the rejected tenderer as “laboratory key expert”, would not be able to prove the 3-year length of service

required by the contracting authority as she does not have the academic background required by the contracting authority – construction engineer, chemical engineer, mechanical engineer. The submitted university diploma indicates that the academic qualification of [REDACTED] is “engineer-physicist” with a major in Engineering Physics.

In addition, [REDACTED] cannot prove that she has at least 5 years of service in an area relevant to the subject matter of the public procurement contract (construction of roads, including road structures and facilities, construction of runways), as she has not provided evidence for the academic qualification of a construction technician. The two pages of [REDACTED]’s employment record book presented in the tenderer’s bid, show that she worked as a laboratory assistant at [REDACTED] from 01.07.1999, but this circumstance in no way alters the fact that her academic background and respectively the qualification awarded to her are not among the major subjects listed in point 6.1.4.1 of the Tender Dossier. Only the front page of the person’s diploma has been submitted and it is not indicative of courses taken, and there are no other data whatsoever to justify the fact that the tenderer has included this expert in the team specified in Appendix No 11.

According to the requirements set out in the notice and in the Tender Dossier, “key experts should have at least 3 years of experience as construction engineers, chemical engineers, mechanical engineers or at least 5 years of experience as construction technicians in an area relevant to the subject matter of the public procurement contract (construction of roads, including road structures and facilities, construction of runways);

In this context the Contracting Authority posed the requirement of a certain length of service rather than an academic degree, but it is noteworthy that the Contracting Authority posed the requirement of specific rather than general length of service.

In our view, the acquisition of experience as construction engineer/chemical engineer/mechanical engineer would be impossible unless a person has undergone the relevant specialised education. The fact that [REDACTED] has a certain length of service as “a laboratory technician” is not a valid proof of her professional experience as a construction engineer/chemical engineer/mechanical engineer.

It has been established that the proposed key expert [REDACTED] also fails to meet the alternative requirement of experience as a “construction technician”.

It should be noted that the setting of certain minimum requirements for technical capacity and/or qualification of the participants is a decision based on judgment and it is part of the operational autonomy of each contracting authority. The beneficiary has complied with the imperative statutory limitations and the requirements to the tenderers’ key experts under discussion are relevant to the subject matter, volume and complexity of the public procurement contract and are non-discriminatory in their nature.

In view of the foregoing, the MA believes that the rejection of [REDACTED] was lawful and well justified. There are no available data to the effect that it has appealed the decision on the ranking and selection of a contractor before the competent authority, i.e. the Commission for Protection of Competition.

### ***Commission position following first Member State reply***

As the managing authority rightly points, both the tender notification and the tender dossier indicated the following requirement in relation to the key experts: "Key experts should have at least 3 years of experience as construction engineers, chemical engineers, mechanical engineers or at least 5 years of experience as construction technicians in an area relevant to the subject matter of the public procurement contract (construction of roads, including road structures and facilities, construction of runways)."

By using the connector 'or', the contracting authority clearly indicated that the fulfilment of one of the two requirements of the tender dossier is sufficient (e.g. 5 years' experience as construction technician is sufficient without the need to prove 3 years of experience as construction engineers, chemical engineers or mechanical engineers).

We remain of the position that the tender notice and tender dossier only specified experience of key experts as selection criterion and not their education.

We remain of the opinion that ██████████'s Master's degree in Physics – Polymers from 1997 gave her access to a career as "construction technician" and that by working as a laboratory technician for a road construction company for a period of over 10 years (starting in 1999) she fulfilled the requirement to have "at least 5 years of experience as construction technicians in an area relevant to the subject matter of the public procurement contract (construction of roads, including road structures and facilities, construction of runways)". We also note that a reference was also made to the road construction projects where ██████████ worked as laboratory technician during her employment in the road construction company "██████████".

In this case, the actual prejudice to the EU budget can be quantified by opening the bid of unjustifiably rejected tenderer. The actual prejudice to the EU budget is the co-financed element of the price difference between the winning bid and the bid of the unjustifiably rejected tenderer. The managing authority should therefore open the envelope with the price bid of the unjustifiably rejected tenderer, quantify the actual impact on the EU budget and apply a financial correction.

If the bids of the unjustifiably rejected tenderers are not opened and the actual prejudice to the EU budget is not quantified, a flat rate correction should be applied in accordance with the principle of proportionality and taking into consideration the levels of financial corrections included in the 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement'<sup>1</sup>. Considering the nature and gravity of the irregular rejection and the fact that the actual prejudice to the EU budget can be quantified if the national authorities agree to the opening of the bid of the unjustifiably rejected tenderer, we consider the financial correction to 10% appropriate.

The amount of ineligible expenditure based on a 10% financial correction would amount to BGN 1 467 037 (= 10% \* BGN 12 225 310 + VAT of 20%) or EUR 750 096 (= 10% \* EUR 6 250 798 + VAT of 20%). Considering the 85% co-financing rate, the financial correction would amount to BGN 1 246 981 or EUR 637 581.

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<sup>1</sup> COCOF 07/0037/03



### ***Second Member State reply***

The managing authority decided to reassess the finding and asked the contracting authority to open the technical and price envelopes of the rejected offer and to carry out a re-evaluation of all the offers in order to establish the ranking of the bids including the rejected bid. In parallel, the managing authority carried out its own analysis and reached the conclusion that the bidder was unlawfully rejected which breaches the main principle in the Public Procurement Law of non-discrimination and equal treatment of bidders and corresponds to point 6 of the 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement'.

The evaluation committee of the contracting authority opened the price offer envelope of the rejected bidder and established that the price of the rejected bidder was higher than the price offer of the winning bidder. The total points awarded to the rejected bidder would be 91,781 and the total points awarded to the winning bidder were 99,166. Therefore, the winning bidder would have been the same.

As mentioned above, the managing authority has established an irregularity in accordance to point 6 of the 'Guidelines' and has decided to apply a 10% financial correction on the total actual expenditure declared under this contract amounting to BGN 13 975 441. This amount is BGN 694 931 less than the contract amount of BGN 14 670 372).

The arguments of the managing authority for applying a 10% financial correction (instead of 25%) are the following:

- the result of the re-evaluation of the bids demonstrates that the fact that the bidder was unlawfully rejected did not impact the ranking of the winning bid, the contract was awarded to the most economically advantageous bid;
- the rejected bidder did not appeal the decision of the contracting authority;
- the contractor has fulfilled his obligations;
- the contractor implemented the contract with BGN 579 108 (net of VAT) less than the contract value.

The managing authority has registered the irregularity in its register. The irregularity will be reported to OLAF.

### ***Commission position following second Member State reply***

We take note that the managing authority has decided to reassess the finding and that now it has established a breach of public procurement rules corresponding to point 6 of the 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement'. The managing authority instructed the contracting authority to open the technical and price envelopes of the rejected offer and to carry out a re-evaluation of all the offers in order to establish the ranking of the bids including the rejected bid. As the result of the final ranking of bids following the re-evaluation remains unchanged, we accept the decision of the managing authority to apply a 10% financial correction.

The amount of ineligible expenditure based on a 10% financial correction amounts to BGN 1 397 544 ( = 10% \* BGN 13 975 441) or EUR 714 563 ( = 10% \* EUR 7 145 639). Considering the 85% co-financing rate, the financial correction would amount to BGN 1 187 912 or EUR 607 379. The financial correction is applied on the total actual expenditure declared under this contract amounting to BGN 13 975 441. This amount is BGN 694 931 less than the contract amount of BGN 14 670 372).

Finding is **closed**.

### **Project 15 – Rehabilitation of road III-181**

#### ***Finding n°11: Quality of works***

The road was opened to traffic in September 2011. During our on the spot visit (in September 2012), we noted that the road is already damaged and has subsequently been repaired. In the section close to Kovachevtzi, the road has been rehabilitated without taking into consideration an existing landslide. As a result of the landslide, the road is already collapsing at this section.

***Action n°11 (Responsible body: Managing authority; Road Infrastructure Agency; Deadline: 60 days; Priority: High):***

The management verifications including quality checks form essential part of the checks to be carried out by the managing authority. The managing authority is requested to advise as to whether the quality problems have been identified during its management verifications and on any corrective action it has proposed. The managing authority should also consider the need for a financial correction due to the under-performance of the project resulting from poor planning.

In future tenders, the beneficiary should ensure adequate quality of the works by improving the project preparation phase and by including all the necessary works in the design and tender documentation and by setting appropriate selection and award criteria to select the works and supervision contractors. Also refer to the finding 12 concerning supervision contracts tendered for low prices.

#### ***First Member State reply***

The finding was accepted and an irregularity alert was registered on 11 January 2013.

The beneficiary set out arguments according to which the inspection was carried out one year after the road had opened. During that period, small localised areas of the carriageway surface underwent wear and tear which was promptly repaired.

During the preparatory period for the road-rehabilitation investment project, and up to the commencement of its implementation, no landslide was registered in the area in question. Landslide processes were activated after the construction activity had begun, and this made it necessary for the beneficiary to take appropriate measures. The Roads Infrastructure Agency (RIA) duly commissioned the performance of geological probing work and the drawing up of a plan to stabilise the landslide, and these activities were carried out at RIA's expense. The managing authority of the Regional Development OP was also promptly informed about the activation of the landslide at km 24+419. During

the on-the-spot check on 19-21 October 2011 in connection with the request for final payment, the MA auditing team ascertained that a landslide had occurred and made recommendations for its stabilisation. As at 13 February 2012 the recommendation had been implemented and appropriate evidence provided. During the road's one year of operation the landslide once again became activated, leading to partial collapse of the carriageway.

According to the beneficiary, this was a case of *force majeure*, which should be classified as unforeseeable. The probable cause of the landslide is the highly mountainous terrain combined with other geological features that are characteristic of the region where the landslide occurred. In essence, a landslide is a natural occurrence, the detailed nature of which is unpredictable, and consequently the contracting authority could not possibly have foreseen its occurrence. The presence of a landslide process and hence the occurrence of a landslide in the area of the works is a circumstance beyond the control of the contracting authority, and on that basis the Beneficiary took the view that it should not be penalised by a financial correction relating to quality of implementation of the project.

At the same time the MA took the view that, in order to form a reasoned and objective opinion concerning the irregularity alert, an on-the-spot check would have to be carried out by persons with appropriate engineering/technical qualifications. An on-the-spot check was carried out on 4 February 2013 covering the physical check of the condition of the carriageway and road facilities. A report was drawn up dated 5 February 2013 containing the following conclusions and recommendations: "Since its opening, the section of road has now been in use for over a year and a half and shows no visible defects. The sagging of the roadway found in the on-site inspection by the Roads Infrastructure Agency and European Commission experts has not yet been remedied. Repairing the effects of the landslide on this section of road is not part of the capital grant project and represents an own contribution by the beneficiary. As a result of the landslide caused by melting snow in the spring of 2012, a small area of the carriageway's hard shoulder has been damaged." Photographs are attached to the report, and findings are set out together with a recommendation on remedying the sagging of the carriageway near Kovachevtsi. The Beneficiary undertook to implement the recommendation by 28 February 2013.

Notwithstanding the argumentation provided by the RIA, the MA initiated the procedure for imposing a financial correction in accordance with Article 10 of the Methodological Guidelines of the Minister of Regional Development, in view of the poor physical condition of the investment.

The financial correction is to be imposed if the beneficiary fails to remedy the deficiencies identified. Failure to take prompt and appropriate action to address the poor physical condition of the investment would have a financial impact. By letter of 15 January 2013, the Beneficiary was notified of the MA's opinion and of the right to provide, within 15 working days of receiving notification, evidence of the shortcomings in physical implementation having been remedied.

By letter of 28 February 2013, RIA submitted the following evidence:

- Evidence of overall condition and quality of implementation – certificates and declarations on the conformity of the construction materials, laboratory samples, reports

and certificates under the Land-Use Planning Act (ZUT), certificate No 15 and report No 16 on acceptance of the works, with no comments.

- Current photographs of the landslide-affected section of road near Kovachevtsi village;
- Copy of the draft geotechnical investigation of the landslide;
- Copy of the "geodetic" part of the draft concerning the landslide-affected section of road; copy of the report on the georadar survey of the landslide area;
- Copy of the part entitled "Carriageway, small equipment" for the section concerned;
- Copies of the agreements with the contractor and the consultant on the stabilisation of the landslide on the affected road section and Statement of Findings (template 15) on acceptance of the works.

Checks on the quality of implementation were carried out in the following chronological order:

- on-the-spot check of 18 March 2011 in connection with the submission of a request for interim payment. Following the check, the beneficiary was instructed to take measures to stabilise the landslide;

- on-the-spot check from 19 to 21 October 2011 in connection with the submission of a request for final payment. Following the check, the Head of the MA requested clarification as to how the landslide that had occurred on the section of road between km 24+419 and km 24+597 was reflected in the reduction in the bill of quantities and hence in the total project amount proposed for verification. It was established that stabilisation of the landslide had been carried out at the Beneficiary's expense, while the section of road affected had been rehabilitated and upgraded under the contract for the implementation of the project construction and engineering works;

- on-the-spot check from 14 to 15 August 2012 aimed at verifying the sustainability of the implementation of the infrastructure project. During the check, it was established that the roadsides and ditches had to be cleared of vegetation and worn road markings renewed. Drainage elements that had been damaged in the lined ditches needed to be replaced and the ditches cleared of debris. Damage to the road surface had to be repaired, and damaged flexible steel fencing replaced. Also in need of replacement was the damaged road sign for the "Elenite" hotel. The Beneficiary was instructed to take measures to remedy the shortcomings identified. By letter of 24 October 2012, RIA confirmed implementation of all corrective measures taken to remedy the deficiencies ascertained by the managing authority's experts;

- on-the-spot check on 5 February 2013 aimed at verifying the sustainability of the implemented infrastructure project, having regard to the findings in the preliminary report on the audit mission carried out by the Directorate-General for Regional and Urban Policy. From the on-the-spot check carried out, it is evident that the road rehabilitation work as a whole was carried out to a high quality standard. The road surface is in good condition, with no visible defects. In relation to the deficiency established in the construction and engineering works carried out (sagging of the carriageway over a small area of the hard shoulder), the photographs provided show that the beneficiary has remedied the deficiency found. Appropriate actions were taken to remedy the poor

physical condition of the investment, and we therefore consider that no financial loss to public funds was incurred.

In the light of the arguments set out and the evidence cited in the foregoing, the following conclusions can reasonably be drawn:

- there has been no breach of the principle of sustainability of project results;
- the project's goals have been achieved;
- there has been no breach of the requirement that the nature of activities under the project must be such as to be eligible for funding.

Given the scale and cost of the project (BGN 9 500 900 including VAT), and taking into account the overall project results achieved by the RIA, the deficiencies which have come to light over the period of operation concern small areas and have now been completely remedied, so that overall implementation has not been compromised. We therefore consider that this part of the irregularity alert should be cancelled.

The landslide near Kovachevtsi was activated, mainly as a result of the ground becoming waterlogged, after construction activities had started on the section of road concerned. In spite of all the feasibility studies and preparatory work carried out, the MA is of the opinion that the beneficiary could not possibly have foreseen the activation of a landslide in the area.

Indeed, by its very nature, a landslide is a *force majeure* event, a natural phenomenon which is difficult and in some cases impossible to predict. We consider that the landslide and the subsequent damage to the carriageway were caused by the occurrence of an extraordinary event which the contracting authority could not have foreseen and/or prevented. We therefore consider the notion of poor planning on the part of RIA to be unfounded.

It should be noted that RIA took appropriate and timely measures from the moment the landslide occurred. It commissioned a geotechnical investigation, including geological probing (November 2010), as well as a georadar survey (June 2011) and the preparation of a work plan for the stabilisation of the landslide (July 2011) on the section of road concerned. All of these activities were paid for out of the Agency's budget.

On 6 October 2011, the RIA concluded an agreement with a contractor concerning the "Emergency repair of a section of road affected by a landslide on road III-181 Bistrita-Kovachevtsi, km 24+500", with a contract value of BGN 199 930 excluding VAT. It is important to note that the repair of the landslide damage does not come under the funding of the Regional Development OP and was covered entirely from the beneficiary's own contribution. New works packages were carried out, such as under-ditch drainage, earth and water-drainage works aimed at protecting the carriageway, the installation of a new pipe culvert and major bulking and reinforcement work under the roadway. In addition, the Regional Roads Management Department, Sofia, a specialised unit of the Roads Infrastructure Agency, in whose area the landslide occurred, is responsible for and is taking action to ensure the proper maintenance of the road surface on the affected section. In conclusion, we are of the opinion that the beneficiary has taken appropriate measures to minimise the damage and negative consequences arising from the landslide that

occurred, that the sustainability of the project is ensured and that there are no grounds for imposing a financial correction.

***Commission position following first Member State reply***

The beneficiary has implemented actions to address the deterioration of the road in question resulting from both regular wear and tear and from the landslide. The finding is **closed** in the context of this audit mission.

Nevertheless the managing authority should continue monitoring the quality of the road. As there are risks related to the sustainability of the project (in appropriate condition), the monitoring to be performed by the managing authority should also include another on-the-spot to be carried out towards the end of the sustainability period.

***Second Member State reply***

The managing authority has stated that according to its Procedures Manual it carries out checks for the sustainability of the investments made for the project for all finalised projects within a 5 year period after the project is finalised. According to the Plan for on-the-spot checks the date for checking this project is 14 September 2014.

***Commission position following second Member State reply***

The Commission takes note of the fact that the managing authority is checking the quality of the road in accordance to its Plan for on-the-spot checks. The Commission strongly recommends that the managing authority continues monitoring the quality of the investments made. The Commission will continue monitoring this issue in its future audit work. The finding is **closed** in the context of this audit mission.

<p><b>Finding 12 relates to projects implemented by both municipalities and by the Road Infrastructure Agency</b></p>
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***Finding n°12: Supervision contracts tendered for low prices***

The proportion of supervision costs in the overall project costs and the proportion of supervision costs expressed as percentage of the works contract is very low for several projects audited and the table below provides details for each project audited.

Project	Works contract (BGN thousand)	Supervision contract (BGN thousand)	Supervision as proportion of works (budgeted amounts)	Supervision as proportion of works (contract amounts)	Supervision as proportion of works (DG Regio assessment)
Dupnitsa	4.100	29	0,97%	0,70%	Very low
Samokov	2.720	30	1,00%	1,10%	Very low
Project 3	4.080	187	4,70%	4,58%	Reasonable
Project 6	4.240	76	4,89%	1,80%	Low
Project 10	5.750	124	4,81%	2,15%	Low
Project 13	12.230	130	4,10%	1,07%	Very low
Project 14	5.270	165	4,78%	3,13%	Reasonable
Project 15	7.700	165	4,82%	2,14%	Low

DG Regio considers that the standard amounts paid for supervision should generally be between 3% and 6% of the works contract value to ensure the quality of supervision and as a result the quality of the underlying works supervised.

**Action n°12 (Responsible body: Managing authority; Road Infrastructure Agency; Deadline: 60 days; Priority: High):**

Abnormally low offers should be examined to assess whether they are realistic in terms of the services necessary to be provided to adequately supervise the related works contracts.

The managing authority is requested to advise whether it had conducted on-spot verifications to check the quality of the works and to advise whether it had noted any quality issues due to the low value of the supervision contracts.

The managing authority is also requested to provide a list of its on-spot checks of quality of the works in priority axis 2 carried out since the beginning of current programming period and to calculate the coverage of these checks as percentage of projects implemented. The managing authority should assess whether this issue is systemic.

***First Member State reply***

The managing authority accepts the finding in principle and provides the following arguments and additional information:

From a legal point of view, we would like to point out that all supervision contracts have been signed in compliance with the public procurement legislation. The application of the legislation by contracting authorities awarding public procurement contracts when spending public funds, including amounts from EU funds, is a legal guarantee for

compliance with the principles of free and fair competition, publicity, transparency and equal treatment, as well as a guarantee for the selection of the best tender.

The market prices attained within the framework of a public procurement procedure, which meets the legal requirements, are presumed to be the optimal ones achieved for the respective subject matter of the contract. In addition, the law prohibits that such prices should be re-negotiated and increased, as this would constitute unequal treatment of the tenderers and accordingly would provide grounds for applying a financial correction.

From an economic perspective and based on the analysis of the Bulgarian Construction Chamber we should underscore that due to the harsh financial and economic crisis in the period 2009-2011 and as a consequence of it, there was a dramatic decline in the volume of foreign investments, which resulted in a shrinkage of the volumes of construction and installation works by an average of BGN 2-2.5 billion. In the situation of a crisis all developers revise their development plans, including their strategies for participation in tenders and pricing. In this connection and due to the lower costs for labour and office equipment, the lower prices of construction materials and fuel, the value of construction dropped by up to 15%. This inevitably led to lower levels of the construction supervision value.

The public procurement procedures for selection of a contractor performing consulting services are held after the tenders for selection of a works contractor. As a result, the representatives of the consultants exercising construction supervision are aware of the proposed shorter time frames for works performance which entails supply of construction supervision, activities in the respective periods and low performance prices prompted by the fact that the costs required for performing the service would also be reduced in proportion to the period of completion.

Furthermore, a comparison of the contracts signed by RIA in its capacity of a Contracting Authority, shows that while in the first stage of the Regional Development OP, where the average value of construction supervision was 2.18% of the average works contract value, in the fourth stage of the Regional Development OP, where the public procurement procedures were conducted in 2012, there was a certain stabilization of the construction sector and the average value of construction supervision contracts increased to reach 3.14% of the average works contract value.

In addition, the value of construction supervision as a service is also a function of its scope pursuant to the Spatial Development Act (ZUT), according to which supervision involves no obligation to exercise investor control. In this connection amendments were also initiated in the Spatial Development Act in line with the supplements to Article 166(2): (supplemented, SG No 82 of 2012, effective 26.11.2012) a consultant exercising construction supervision 'may conduct pre-development studies, preparation of the design, process and coordination of the construction process prior to the commissioning of the construction facility, including control on the quantities, quality and conformity of the performed construction and installation works and input materials with the contracts for construction performance, as well as other activities subject to contracting.'

In connection with this amendment of ZUT, the MA required from the beneficiaries to include in their future contracts with contractors exercising supervision the obligation under Article 166(2) of the Spatial Development Act, quoted above, which will also result in the higher values of this service.



One should also bear in mind that the teams in charge of implementation of the individual projects include experts exercising investor control.

In addition, with a view to improving the quality control of the physical implementation of the projects, the MA has concluded 8 contracts for outsourcing investor control concerning road projects, improvement of the urban environment, public transport, investments in building stocks, measures to prevent floods and landslides, tourism infrastructure, which also improved significantly the control on the quality of works performance.

From the beginning of the programming period until 31 January 2013 the managing authority conducted 291 on-the-spot checks, including checks on the quality of performance, of 79 grant contracts or an average of 3-4 checks per contract. At present the managing authority is implementing a plan for on-the-spot checks of completed projects to review sustainability for 2013, which envisages on-the-spot inspections of all completed projects for rehabilitation reconstruction of roads, both municipal and belonging to the second class / third class road network.

In relation to the submitted arguments and evidence we consider that the finding could be closed.

#### ***Commission position following first Member State reply***

The Commission notes the explanation of the Bulgarian authorities about the influence of the financial and economic crisis on the Bulgarian market in construction and related services. The Commission also notes the increase of the average percentage value of supervision in 2012 after the conditions in the sector stabilised.

The Commission remains of the opinion that supervision contracts tendered for e.g. 0.70%, 1.07% or 1.10% of the value of the underlying works contract appear not to be realistic. Such abnormally low offers should be examined to assess whether they are realistic in terms of the services necessary to be provided to adequately supervise the related works contracts.

The separate contracts concluded by the managing authority appear to be a good tool to improve the quality control of the physical implementation of the projects, together with the increased frequency of the on-the-spot checks carried out by the managing authority.

The finding is **closed** in the context of this audit mission. The Commission will continue monitoring this issue in its future audit work.

#### ***Second Member State reply***

The managing authority has stated that as at 31 December 2013 it has carried out 385 on-the-spot checks. It has provided as an annex to its letter summary information on the status of the recommendations from the on-the-spot checks for road projects grouping two types of projects:

- finalised projects – status of the recommendations for the final payment claim and for follow up checks on the sustainability of the investment;
- ongoing projects – status of all recommendations from on-the-spot checks.

According to the managing authority the beneficiaries have undertaken timely and adequate measures in order to implement the recommendations given in relation to the good maintenance of the roads. The managing authority considers most of the recommendations as implemented. The managing authority has imposed financial corrections for the measures which have not been implemented. Five recommendations from on-the-spot checks are in the process of being implemented. The managing authority will carry out follow-up checks in order to verify the implementation of these recommendations.

*Commission position following second Member State reply*

The Commission takes note of the information provided by the managing authority. As stated above, the finding is **closed** in the context of this audit mission and the Commission will continue monitoring this issue in its future audit work.

1. ANNEX II - SUMMARY OF PROPOSED AND ACCEPTED FINANCIAL CORRECTIONS

Finding	Amount on	Amount on	% Rate of	ERDF/CF	%	Amount of	Date and
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